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No. 04-574

Supreme Court, U.S.
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# In The
# Supreme Court of the United States

FOREST L. DARBY,

*Petitioner,*

v.

A-BEST PRODUCTS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio**

## BRIEF OF RESPONDENT OLD ORCHARD INDUSTRIAL CORP., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO VAPOR CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Does this Court have jurisdiction to hear this matter under 28 U.S.C. § 1257 in the absence of a final order dismissing the entire action below?

II. Did the Supreme Court of Ohio, following overwhelming federal and state appellate precedent applying this Court's decision in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), correctly hold that the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – preempts petitioner's state common-law tort claims against locomotive equipment manufacturers?

## PARTIES TO THE PROCEEDING

The Petitioner is Forest L. Darby.

The Respondents are Old Orchard Industrial Corp., Viad Corp. and A-Best Products Company.

Pursuant to Rule 26 of the *Supreme Court Rules*, Old Orchard Industrial Corp. states that it is a wholly owned subsidiary of Brunswick Corporation, a publicly traded entity.

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## STATEMENT OF THE CASE

Respondent Old Orchard Industrial Corp. states that the background information provided in the Petition for Writ of Certiorari is generally correct. The only correction would be that Respondent Old Orchard's predecessor-in-interest, Vapor Corporation, manufactured a locomotive part, not the entire locomotive.

## REASONS TO DENY THE PETITION

### I. NO FINAL ORDER HAS BEEN ENTERED.

This Court should decline to address the issues involved herein because there is no final order or judgment in this case. The jurisdiction of this Court to review decisions of the highest courts of each state is primarily limited to the review of a "final judgment or decree." 28 U.S.C. § 1257. The exceptions to the final judgment limitation are "very few." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (outlining the four categories of exceptions to this Court's jurisdictional requirement of a final order). None of those exceptions apply to this case.

Petitioner's claims against a large number of defendants remain. Even though the trial court's determination as to the claims asserted by the Petitioner against the Respondents is final, no final order has been entered for the entire case. The trial court denied Petitioner's Motion to Amend the Complaint to add the Respondents as party-defendants on the basis of federal preemption, but the trial court did permit the Petitioner to add several new defendants. (*See* Petitioner's Appendix A, at 2a-4a). In addition, numerous defendants remain from the original Complaint. Although a number of the defendants have likely settled or been dismissed, no final order dismissing

the case in its entirety has been entered. The appeal proceeded in the Ohio court system based on the trial court's determination that "there was no just reason for delay" as to the claims against the Respondents, *id.* at 4a, not because a final order has resolved the case in its entirety.

Although the Ohio appellate courts could proceed with the appellate process, this Court should be reluctant to entertain the appeal at this time. What other potential reviewable issues may surface in the case as to the remaining defendants are unknown at this point. Nevertheless, the claims against the remaining defendants in the case present, at the very least, numerous due process pitfalls, and could result in additional appeals for this Court's review.

The primary purpose of the final judgment requirement for this Court's review is to avoid piecemeal reviews of the case. *Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). If the Court rules on the issues presented in the Petition, remaining issues in the case as to other defendants may result in a return of the case to this Court. Until all of the claims against all of the defendants in the case are resolved, this Court's requirement for the review of a final order, has not been met. Thus, the denial of the writ is appropriate.

## II. THE OHIO SUPREME COURT CORRECTLY APPLIED PREEMPTION ANALYSIS AND RELIED UPON PRIOR RULINGS OF THIS COURT.

Even if the Court determines that a sufficient final order has been entered with respect to the Respondents, the Ohio Supreme Court correctly applied the federal law and the preemption analysis which this Court has repeatedly

outlined. This Court has already decided the federal questions involved in the Ohio Supreme Court's decision. The Ohio Supreme Court relied upon and correctly applied this Court's holding in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), as to the scope of the preemptive field of the Locomotive Boiler Inspection Act (49 U.S.C. § 20701 *et seq.* ("BIA")).

Moreover, the issue of whether Congress intended the BIA to preempt state law claims has been addressed in on-point opinions by the courts of last resort of four states, inclusive of Ohio, and at least four United States Courts of Appeals. The Ohio Supreme Court's decision is wholly in agreement with every one of these appellate court decisions. All of these courts agree with the decision of the Ohio Supreme Court, which Petitioner seeks to appeal. Because all of the state courts of last resort and the United States Courts of Appeal have been unanimous in favor of preemption and because all of the federal questions raised by the Petitioner have previously been determined by this Court, the denial of the Petition for Writ of Certiorari is appropriate.

### A. The Ohio Supreme Court Correctly Applied the Federal Preemption Analysis Set Forth in Multiple Cases by this Court.

The United States Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2, quoted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Federal law preempts state law where (1) the state law conflicts with federal law or compliance with both state and federal law is impossible; (2) Congress has legislated comprehensively, thus occupying an entire field of regulation and

leaving no room for the states to supplement federal law; (3) federal law expressly preempts the state law; or (4) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress or interferes with the methods by which the federal statute was designed to reach Congress's goal. *See Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 368-69 (1986); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The Petitioner asserts that the Ohio Supreme Court failed to begin its analysis with a presumption against preemption. However, this Court recently unequivocally held that there is no "'assumption' of non-pre-emption . . . when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (national and international maritime commerce). In this case, as in *Locke*, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.; see also Carrillo v. ACF Ind., Inc.*, 20 Cal. 4th 1158, 1163, 86 Cal. Rptr. 2d 832, 890 P.2d 386 (1999). Thus "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108.

### B. As this Court Determined in *Napier*, through the BIA, the United States Congress has Enacted a Comprehensive Regulatory Scheme, Which Preempts the Entire Field of Locomotive Safety and Equipment.

This Court has already explicitly addressed the preemption power of the BIA in *Napier*, holding that the

BIA occupies the entire field. The Court examined the scope of the BIA and found that the United States Congress had preempted the entire field of locomotive safety and equipment, which encompasses all state law within the scope of authority delegated to the Secretary of Transportation including the design, construction and materials of locomotives and their parts. *Napier*, 272 U.S. at 611-13.

It has been settled for almost 80 years, since this Court's decision in *Napier*, that the preemptive scope of the BIA precludes all state law respecting locomotives and locomotive parts, material or equipment used in interstate commerce. *Napier* held that Congress intended the BIA "to occupy the field" in respect of all areas subject to the BIA, and that the BIA accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission. 272 U.S. at 613. Those areas include "the design, the construction, and the material of every part of the locomotive" – the "'entire locomotive . . . and all parts and appurtenances thereof.'" *Id.* at 611, 608.

At issue in *Napier* were Georgia's and Wisconsin's laws requiring fire box doors and cab curtains on all locomotives operating in those states. The court ruled that the BIA preempted such laws even though it found or assumed that (1) there was no conflict between the devices required by the states and those required by federal rules, (2) the state laws promoted safety, and (3) the state rules would no more than incidentally interfere with commerce. 272 U.S. at 610-11. This Court found *that* the BIA conferred on the Commission "general" power to regulate locomotive safety equipment, *id.* at 611-12; that the state requirements were "within the scope of the authority delegated to the Commission" by the BIA, *id.* at 611; and that BIA's grant to the Commission of that general power preempted all state law falling within the scope of the Commission's authority. *Id.* at 613.

State law concerning "the design, the construction, or the material" of any part or appurtenance of the locomotive is thus preempted because it is within the Commission's authority – whether or not the state law conflicts with the federal rule, and whether or not there is any applicable federal rule at all (*Napier*, 272 U.S. at 613 (emphases added)):

> *It is also urged that, even if the Commission has power to prescribe* an automatic firebox door and a cab curtain, *it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, . . . if true, is without legal significance.* The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

*Napier* remains the law of the land.[1] The locomotive parts that Petitioner attempted to claim were defective in the action below fall squarely "within the scope" of FRA's authority, and thus, within the preempted field. *Napier*, 272 U.S. at 611. The following appellate holdings agree that *Napier* still controls: *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2nd Cir.), *cert. denied sub nom. Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d

[1] Indeed, in 1983, this Court summarily affirmed a decision that "locomotive equipment" is "an area totally preempted by" the BIA. *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983). The Supreme Court's summary affirmance is a binding precedent. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

981 (3rd Cir. 1982), *aff'd*, 461 U.S. 912 (1983); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster*, 205 F.3d 851, 860-61 (5th Cir. 2000); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001); *King v. Southern Pacific Transp. Co.*, 855 F.2d 1485, 1489 n.2 (10th Cir. 1988); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549, 553-55 (Ala. 2000); *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996, *cert. denied*, 531 U.S. 958 (2000); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 410 S.E.2d 437, *cert. denied*, 200 Ga. App. 895 (1991); *Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305, 491 S.E.2d 511 (1997); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind.), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Furlough v. Union Pacific R. Co.*, 766 So. 2d 751, 761-62 (La. App. 2000), *writ denied*, 781 So. 2d 556 (2001); *Kilgore v. General Motors Corporation*, 853 So.2d 171 (Ala. 2002); *West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W.Va. 2003).

As this Court explicitly stated in *Napier*, 272 U.S. at 611:

> The LBIA provides exclusive federal authority to regulate the design, construction and material of every part of the locomotive and tender as well as all appurtenances. . . . The LBIA preempts any state law that regulates locomotive

equipment because the LBIA was enacted with the congressional intent to occupy the field of locomotive equipment.

Railroads have been "subject to comprehensive federal regulation for nearly a century." *Carrillo*, 20 Cal. 4th at 1163, (quoting *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982)). Congress "inten[ds] that railroads should be regulated primarily on a national level through an integrated network of federal law," and has regulated "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R. Co. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993).

The federal government has specifically regulated the design, maintenance, and safety of locomotives for over a hundred years. In 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), and in 1911 it followed with the BIA, now known as the Locomotive Inspection Act. The SAA and BIA – enacted with the same Congressional purposes, *Urie v. Thompson*, 337 U.S. 163, 190 (1949) – are now codified, respectively, at 49 U.S.C. §§ 20301-20306 and 20701-20903 (1994).

The BIA grants federal regulators authority over "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611-13. The BIA requires locomotives to be "safe to operate without unreasonable danger of personal injury," 49 U.S.C. § 20701, and to that end vests in the Secretary of Transportation, rule-making power adequate to protect employees against disease as well as against accidents, and "the power to make rules for employee health has been exercised." *Urie*, 337 U.S. at 193 (BIA covered employee injury from long-term inhalation of sand dust on locomotive).

The Federal Railroad Administration ("FRA") regulates railroads under delegation of authority from the Secretary of Transportation. The FRA has exercised its authority to regulate the design, construction and material of the locomotive and all of its parts, including, for example, cab seats, wheel brakes, hand brakes, couplers, handholds, sill steps, running boards, and ladders, *see* 49 C.F.R. Part 229 (locomotive safety standards), and specifically motors (49 C.F.R. §§ 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. §§ 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab (49 C.F.R. §§ 229.115-135).

The BIA mandates not only the design, construction and material, but also the inspection, testing and maintenance of locomotives. 49 U.S.C. § 20701; *see generally*, 49 U.S.C. §§ 20701-20903.1. Regulations under the BIA require daily inspections (49 C.F.R. § 229.21); thorough inspection and testing of gauges, electrical devices, insulation, steam generators, and other components every three months (49 C.F.R. § 229.23-25 and Form FRA F180-49A); and further tests annually and biennially (49 C.F.R. § 229.27-31).[2]

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[2] Under these regulations, for example, brake components must be "cleaned, repaired or replaced," a steam-generator component must be "removed and inspected," the main reservoir must be "hammer tested over its entire surface," "all internal and external surfaces" must be inspected at specified intervals, and a periodic inspection must be performed annually. 49 C.F.R. §§ 229.27, 229.31; *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486-87 (1943) (approving rules under the BIA requiring water tanks to "be maintained free from leaks," "inspected" and "cleaned, if necessary" at least once a month, and cab aprons to be "maintained in a safe and suitable condition").

The BIA has regulated inspection and maintenance since at least the 1930s. For example, when steam boilers were in common use, BIA

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The locomotive parts Petitioner here claims are defective fall squarely within the federal authority over "every part" of the locomotive. Steam generators are specifically regulated, 49 C.F.R. §§ 229.103-113, as are brakes, 49 C.F.R. §§ 229.46-59. Further, insulation must be inspected and kept in good condition, and must be present when the federal regulations require it. *See* 49 C.F.R. §§ 229.25(b) (requiring periodic inspection of "visible insulation"), 229.89 (prohibiting "[b]roken or badly chafed insulation" on certain connections), 229.41 (exposed pipes carrying hot gases or high voltage must be "equipped with guards to prevent personal injury"), and 229.83 (certain parts that may become electrically charged must be insulated).[3]

As further evidence that asbestos on locomotives falls within the purview of the federal government, Congress enacted the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, 106 Stat. 972, on September 3, 1992. Section 10 of that Act amended § 202 of the Federal Railroad Safety Act of 1970 (45 U.S.C. § 431) ("FRSA"), as amended by the 1992 Act, by adding at the end of § 202 a new subsection (t) requiring the Secretary of Transportation to assess "the extent to which environmental . . .

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regulations required periodic removal, partial disassembly, cleaning, inspection for cracks and other damage inside and out, and testing of the boilers. *See, e.g.*, 49 C.F.R. §§ 91.10-11, 91.16, 91.18, 91.304-05 (1939). BIA regulations expressly held railroads responsible for "repair" and maintenance of locomotives. 49 C.F.R. §§ 91.200, 91.12, 91.20 (1939).

[3] Federal regulation of locomotive insulation in fact extends back before the Petitioner would have begun working on or around locomotives. *See, e.g.*, former 49 C.F.R. § 91.16 (1939) ("lagging" [insulation] on boilers must be removed every five years); 49 C.F.R. § 91.254 (1939) ("a careful inspection of all visible insulation . . . shall be made and all defects repaired"); 49 C.F.R. § 91.253 (1939) (electrical insulation must be tested at least annually).

conditions in locomotive cabs affect . . . health," including consideration of "the effects on train crews of the presence of asbestos in locomotive components," and to "complete a rulemaking proceeding to consider prescribing regulations to improve the safety and working conditions of locomotive cabs." The 1992 Act required a "report to Congress on the reasons for that determination" if "the Secretary determines not to prescribe regulations."

Pursuant to this mandate, in September 1996, the FRA issued a Report to Congress addressing whether asbestos was a possible factor affecting locomotive cab safety and working conditions. It expressly found that asbestos on locomotives posed no health problem and that further regulation of asbestos was unwarranted. FRA Report to Congress, *Locomotive Crashworthiness and Cab Working Conditions* at 10-1, 10-12, 12-9 (1996).[4] (A copy of the relevant portions of this report is attached as Appendix F to the Petition for Writ of Certiorari).

The BIA is, in sum, comprehensive, and like its sister statutes, the SAA, "was intended to occupy the field." *Napier*, 272 U.S. at 611-13. The BIA's field includes "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," indeed any matter within federal regulators' authority under the BIA. *Napier*, 272 U.S. at 611-13. In addition, the BIA's field preemption is integral to Congress's scheme of promoting interstate commerce. Congress intended to ensure trains are subject to "one set of equipment regulations," so that the rules do not change when the trains cross state lines:

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[4] *See Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate . . . ").

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."

*Law v. General Motors Corp.*, 114 F.3d at 910 (quoting *Southern Pacific Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 811 (9th Cir. 1993)). Train regulation is "peculiarly [a subject] that calls for uniform law." *Carrillo*, 20 Cal. 4th at 1169. Otherwise, permitting state standards would require cars and locomotives to change "as they cross state lines, or adhere to the standard set by the most stringent state," and would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169.

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, provides a uniform federal system of compensation for on-the-job injuries – "a mechanism that doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. In a FELA action, the BIA "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401, 56 S. Ct. 504, 80 L. Ed. 740 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law" under FELA. *Urie*, 337 U.S. at 189. Congress intended the BIA, SAA and FELA to be considered together, *Urie*, 337 U.S. at 189, and preemption applies with special force to railroad workers' injuries (*Law*, 114 F.3d at 910):

> It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144 (1994). The FRSA is not limited to locomotives and authorizes the Secretary of Transportation to issue supplemental regulations in the area of railroad safety generally. The FRSA contains express preemption and savings clauses that severely restrict the power of states to regulate in respect of any aspect of railroad safety. 49 U.S.C. § 20106. The FRSA also explicitly underscores the importance of uniform laws relating to railroad safety: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform* to the extent practicable." 49 U.S.C. § 20106 (emphasis added). Significantly, the FRSA purposely left the BIA "intact, including its preemptive effect." *Marshall v. Burlington Northern*, 720 F.2d at 1152-53; *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Thus, the BIA is part of the comprehensive scheme of federal regulation over locomotive safety and equipment and preempts all state law today, just as it did almost 80 years ago when this Court definitely determined the preemptive scope of the BIA in *Napier*.

### C. The BIA Precludes All State Regulation, including State Law Tort Claims.

Petitioner argues that state law is not preempted unless it conflicts with, frustrates or directly and substantially affects a federal law. (Petition for Writ of Certiorari ["Pet."] 19). However, Congress's relevant "intent" in occupying the field is "to exclude state regulation" from

the field, so any state law in the field necessarily "conflicts with" that intent and is preempted. *English v. General Electric Co.*, 496 U.S. 72, 79-80 n.5 (1990). "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), and "[t]he States must leave all regulatory activity in [the occupied field] to the Federal Government." *Michigan Carriers and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984).

Further, *Napier* and a long line of other cases reject the Petitioner's argument. This Court in *Napier* stated that a conflict or substantial effect on a federally regulated matter is irrelevant to field preemption. *Napier* found that state laws were preempted even if they promoted the same purpose as the federal act, *i.e.*, safety. 272 U.S. at 610-11, 613. Whether state law is "inconsistent with" federal requirements is "without legal significance"; so is whether the Commission "has not seen fit to exercise its authority" on the matter at all. *Id.* at 613. Consequently, a state law's having only an "incidental" effect on commerce does not save it. *Id.* at 611.

Every appellate court to address the issue agrees. "[A]ny state law that attempts to regulate within the domain is preempted," and the "relevant question" for preemption under the BIA "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place." *Oglesby*, 180 F.3d at 461; *Springston*, 130 F.3d 241; *Law*, 114 F.3d 908; *First Security Bank v. Union Pacific R. Co.*, 152 F.3d at 880-81. Congressional occupation of the field "leaves no place for state common law actions," (1) whether "consistent, complementary, additional, or otherwise" to federal law and (2) although no

federal regulation directly speaks to the issue. *Carrillo*, 20 Cal. 4th at 1168 (citation omitted).

The Petitioner misstates field preemption analysis. There is no requirement to show particular actions preempted. *All* law in the field is preempted. In *Napier*, the Court did not inquire whether Congress had specifically considered curtains and fire doors; state law respecting them was preempted because the requirements were within the "broad scope of the authority conferred upon the Commission." 272 U.S. at 611. In *Oglesby*, *Springston*, *First Security* and *Law*, the Second, Sixth, Eighth and Ninth Circuits respectively found state-law claims preempted regardless of whether Congress (or the FRA) considered the "particular" equipment or claims there at issue, or even tort claims generally. Indeed, the Petitioner has it backwards. Because the BIA occupies the field, tort claims within the field are preempted *absent evidence Congress intended to preserve them*. *Carrillo*, 20 Cal. 4th at 1168-69.

Petitioner's claims here fall squarely within the field. Petitioner alleges that the Respondents' products were defective because their parts included asbestos materials. The Ohio Supreme Court correctly determined that the claims are therefore preempted because they directly attack the "design," "construction" and "material" of "part[s] of the locomotive." *Napier*, 272 U.S. at 611.

Regulation of all locomotive parts and materials is within the "broad scope of the authority conferred upon the [Secretary]." *Napier*, 272 U.S. at 611-13; *Law*, 114 F.3d at 911; *Oglesby*, 180 F.3d at 461. So, in particular, is the protection of employees against inhalation of hazardous substances. *Urie v. Thompson*, 337 U.S. at 193 (silicosis from inhalation of locomotive sanders). Indeed, the Secretary already regulates insulation under the authority

of the BIA, specifically considered regulating asbestos, and found further regulation of it unwarranted.

Field preemption "by definition means congressional intent generally extends beyond the express terms of the statute and regulations to all aspects coming within their contemplation," including common-law claims. *Carrillo*, 20 Cal. 4th at 1168;[5] *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-870; *Cipollone*, 505 U.S. at 521-23. That rule is squarely applicable to the BIA. *Oglesby*, 180 F.3d at 460-61, 462 (BIA preempts common-law defect and failure-to-warn claims concerning an engineer's seat); *Law*, 114 F.3d at 910-11 (BIA preempts common-law design defect and failure-to-warn claims concerning

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[5] A majority of the *Medtronic Inc. v. Lohr* Court stated that "insofar as the [Medical Device Amendments] preempt[ ] a state requirement embodied in a state statute, rule, regulation, or other administrative action, [they] would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action." 518 U.S. 420, 504-05 (1996) (Breyer, J., concurring); *accord*, 518 U.S. at 510-11 (O'Connor, J., joined by Rehnquist, Scalia and Thomas, JJ., dissenting) (preemption clause "clearly pre-empts any state common-law action that would impose a requirement different from, or in addition to, that applicable under the FDCA – just as it would pre-empt a state statute or regulation that had that effect"). *See Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court"). As Justice Breyer explained, it would be absurd to preempt requirements imposed by state legislative or regulatory bodies, but not state judicial bodies. "To distinguish between [state regulations and common-law tort suits] for pre-emption purposes would grant greater power (to set state standards 'different from, or in addition to,' federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." 518 U.S. at 504.

Petitioner also relies on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238. It changes nothing. *See Scheiding*, 22 Cal. 4th at 480 ("unlike the situation in *Silkwood*, the field occupied by the BIA must necessarily extend to state law tort recovery").

insulation, engines and brakes); *Springston*, 130 F.3d at 244-45 (BIA preempts common-law negligence and strict liability design defect claims for failure to install better warning devices on locomotive); *Marshall v. Burlington Northern*, 720 F.2d at 1152; *Eldridge v. Missouri Pacific R.*, 832 F. Supp. 328 (E.D. Okla. 1993); *Central of Ga. R. Co. v. Markert*, 410 S.E.2d at 438 (similar); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902; *Key v. Norfolk Southern Railway Co.*, 491 S.E.2d 511; *cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 675, 113 S. Ct.1732, 123 L. Ed. 2d 387 (1993) (FRSA preempts common-law claims); *Capozzi v. Blanchette*, 433 F. Supp. 704, 705 (W.D. N.Y. 1977) (FRSA preempts common-law design defect claim); *Ouellette v. Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (same).

Petitioner attempts to argue that the recent case of *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), an express preemption case, has changed preemption analysis. (Pet. at 17-19). However, *Sprietsma* does not apply to the field preemption analysis herein. *Sprietsma* involved the determination of whether the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ("FBSA"), preempted a state common law tort action seeking damages primarily based on the alleged failure to install a propeller guard on a motor. 537 U.S. at 54-56. The FBSA contains an express preemption clause, but more importantly, contains the following express savings clause: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311. The Court found that the savings clause excludes common law tort claims from the scope of the express preemption clause. 537 U.S. at 63-64. This Court noted that the Secretary of Transportation had limited the scope of preemption by stating "[e]xisting state laws that regulated

matters not covered by the federal regulations continued to be exempted." *Id.* at 60 (citing 37 Fed. Reg. 15777-15785).

Further, the Court addressed arguments that the enactment of the FBSA implicitly preempted common law claims seeking to impose additional requirements on manufacturers, such as propeller guards. 537 U.S. at 64-70. However, given that the savings clause expressly preserved state common law tort claims, this Court found that the FBSA did not completely occupy the field. *Id.* Applying conflict preemption analysis and giving merit to the intentional placement of the savings clause in the statute, the Court determined common law claims were not preempted. Unlike the FBSA, the BIA does not save common law tort claims and as this Court found in *Napier*, completely occupies the field. Accordingly, Petitioner's reliance on *Sprietsma* is misplaced.

### D. State Tort Claims against Locomotive and Locomotive Part Manufacturers are Preempted.

The Petitioner asserts that the preemptive scope of the BIA only applies to railroads, not manufacturers. (Pet. at 15). However, every federal court of appeals and every state supreme court to consider the issue agrees that the BIA preempts state tort claims against manufacturers. The Second Circuit so held in *Oglesby*, 180 F.3d 458, as did the California's Supreme Court in *Scheiding*, 22 Cal. 4th 471, the Alabama Supreme Court in *Kilgore v. General Motors Corporation*, 853 So.2d 171, and the West Virginia Supreme Court of Appeals in *West Virginia Asbestos Litigation*. The Ninth and Sixth Circuits have likewise so held. As the Ninth Circuit stated in *Law*, the "distinction

[between manufacturers and railroads] . . . is without significance" because "[i]mposing tort liability on railroad equipment manufacturers" would force them to conform to state standards, thereby "transfer[ring] the regulatory locus from the Secretary of Transportation to the state courts – a result the BIA was clearly intended to foreclose." 114 F.3d at 911-12. *Accord*, *Springston*, 130 F.3d at 244-45 (defect claim against manufacturer preempted); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (same).

Preemption depends on whether a claim is within the preempted field, not on who the defendant is. *Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995) ("Under *Cipollone*, the analysis focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement. . . . "). Thus, it is *what* is regulated, not *who* is regulated, that matters. What is regulated here is "the design, the construction, and the material" of locomotive "part[s]" and "appurtenances." *Napier*, 272 U.S. at 611. Since Petitioner's claims fall within the field, they are preempted. *Accord*, *Law*, 114 F.3d at 911-12.

The BIA covers manufacturers. Any "manufacturer . . . of railroad equipment" who violates or causes the violation of "any requirement of . . . the Locomotive Inspection Act" is subject to penalties. 49 C.F.R. §§ 229.7(b), 230.0. Accordingly, if a locomotive manufacturer violates applicable provisions of the BIA or FRSA or their regulations, its conduct is clearly within the enforcement reach of the Secretary of Transportation, and it would be subject to substantial civil penalties under § 21302. Further, the Secretary of Transportation has the exclusive discretion to determine who is subject to its regulations and to enforce them accordingly. *Id.*

Even if the penalty provisions were not directly applicable to manufacturers, the "realities of the business world" are that "[b]ecause railroad operators are liable for any injuries suffered by their employees, they would not buy locomotives, cars and other equipment that fall short of the BIA standards." Doing so not only would risk FELA damage awards, but would subject railroad operators to daily fines of up to $20,000 for every violation. Thus, "[l]ocomotive manufacturers already have every incentive to comply with federal standards." *Law*, 114 F.3d at 912.[6]

Moreover, because the preemptive field, namely, the "design, the construction, and the material of every part of the locomotive" is "in the hands of a manufacturer," Congress's intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 911-12. Finally, it would make no sense, and defeat Congress's purpose, if claims respecting locomotive parts were preempted as to the railroad that buys them but not as to the manufacturer that sells them. Congress intended that "railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d at 152. The "uniform national regulation" of locomotive equipment is a centerpiece of Congress's plan, and is designed to avoid subjecting locomotives to non-uniform standards from one state to the next. *Law*, 114 F.3d at 910.

As the Ninth Circuit explained in *Law*, "[a]part from compensating victims of accidents for their injuries, the

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[6] *Cf. Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (subjecting supplier of tire components to state court jurisdiction would "undoubtedly create[ ] an additional deterrent to the manufacture of unsafe components" but is unnecessary because "similar pressures will be placed on [the supplier] by [its] purchasers . . . ").

purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state . . . " *Id.* at 910-11. The goal of the BIA is to prevent the paralyzing effect on railroads from patchwork requirements by each state concerning safety devices on locomotives crossing state lines. To facilitate this goal, the BIA applies to manufacturers of locomotives and their component parts as well as to railroad carriers. Petitioner's state tort claims concern the design, construction, and material of the locomotive, its parts and appurtenances, and those claims are preempted.

## III. NOTHING HAS CHANGED SINCE THIS COURT DECLINED TO REVISIT THE PREEMPTIVE SCOPE OF THE BIA ON FOUR OCCASIONS IN THE LAST EIGHT YEARS.

By denying certiorari in *Dillon* (1997), *Springston* (1998), *Oglesby* (1999), and *Scheiding* (2000), this Court has rejected the opportunity to revisit the scope of the BIA four times in the last eight years. Undoubtedly, the Court has exercised its "judicial discretion" to deny such review precisely because federal law in this area was settled long ago by *Napier* and no federal court of appeals or state court of last resort has made a conflicting decision. *See* Sup. Ct. Rule 10, "Considerations Governing Review on Certiorari." The Ohio Supreme Court's decision was exactly the same as the decision appealed from the California Supreme Court in *Schieding*.

Nothing has changed since this Court denied the petitions for writ of certiorari in each of those four cases. Instead, as is discussed in more detail below, an even greater litany of cases has now agreed that Petitioner's claims fall within the field preempted by the BIA. Accordingly, as the Court in *Napier* found almost 80 years ago,

the BIA preempts the entire field of locomotive safety and equipment, including the design, construction and materials of the locomotive, its parts and appurtenances.

## IV. THE OHIO SUPREME COURT'S DECISION IS IN AGREEMENT WITH EVERY OTHER APPELLATE COURTS ADDRESSING THE SAME ISSUES.

The Ohio Supreme Court's determination is entirely consistent with every other appellate court addressing BIA preemption of state law tort claims. The case law is unanimous in finding state law tort claims involving locomotive equipment are preempted by the BIA.

Three other state courts of last resort have specifically ruled on the issues raised by the Petitioner, the California Supreme Court in *Scheiding*, the Alabama Supreme Court in *Kilgore*, and the West Virginia Supreme Court of Appeals in *West Virginia Asbestos Litigation*. All three agree with the Ohio Supreme Court, and all three involved substantially identical facts as those at issue herein. In addition, the United States Courts of Appeals for the Second, Sixth, Eighth, and Ninth Circuits, *Oglesby, Springston, First Security,* and *Law*, respectively, have all reached the same conclusion as the Ohio Supreme Court.

***Scheiding v. General Motors Corp.*:** The California Supreme Court in *Scheiding v. General Motors Corp.*, *supra*, held that the BIA preempts asbestos claims against the manufacturers of locomotives. The court reviewed the history of BIA preemption and concluded that "*Napier* continues to articulate the preemptive scope of the BIA and thus forecloses state law causes of action against locomotive manufacturers for defective design of their product." The court ruled that all state causes of actions against locomotive manufacturers for asbestos exposure

are preempted by the federal BIA. Reiterating the rational from *Napier*, the court explained that the broad preemptive sweep is necessary to ensure uniform national regulation and avoid the need to remove or add equipment between states. *Scheiding,* 93 Cal. Rptr.2d at 345.

The court noted that in addition to compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. *Id.* at 345. If each state were to establish different liability triggering standards, manufacturers would be forced to sell locomotives whose equipment could be changed as the locomotive crossed each state line. Obviously, Congress's goal of uniform regulations would be undermined. *Id.*

The *Scheiding* court emphasized that imposing tort liability on locomotive manufacturers clearly would affect the design, the construction, and the material of locomotives. The imposition of tort liability on railroad equipment manufacturers would force them to conform to design and construction standards imposed by the states, transferring the locus from the Secretary of Transportation to state courts and thereby constraining the Secretary's regulatory authority and undermining the goal of uniformity. *Id.* at 348.

The *Scheiding* court also addressed the absence of any specific regulation of asbestos by the Secretary of Transportation. The court found that although there are no regulations regarding asbestos, such a regulatory scheme is entirely within the purview and the prerogative of the Secretary of Transportation. The court further stated that warning requirements are also within the scope of the Secretary's authority because the subject matter of any such labels would fall under the BIA. Accordingly, the California Supreme Court held that all claims of asbestos

exposure to asbestos on locomotives are preempted by the Boiler Inspection Act.

***Kilgore v. General Motors Corporation*:** The Alabama Supreme Court also found preemption under the BIA in *Kilgore v. General Motors Corporation*, 853 So.2d 171 (Ala. 2002). The plaintiffs asserted state law product defect and failure to warn claims against General Motors for their father's alleged exposure to asbestos from locomotives during his work for the railroad. The Alabama Supreme Court found that the trial court improperly denied GM's motion for summary judgment because the claims were preempted by the BIA. The court acknowledged *Napier* as the seminal case establishing the BIA's preemptive effect and agreed that the preemptive scope of the BIA included state law causes of action.

The court specifically addressed the Petitioner's assertion herein that the federal statute should be narrowly construed and that state tort law actions will not be preempted unless they specifically conflict with the federal statute. *Id.* at 177-78. Noting that this Court has already determined that the BIA occupies the entire field of locomotive equipment, the Alabama Supreme Court found that "narrowness is not an issue; the [BIA] preempts the entire field." *Id.* The court also dismissed the argument that there is a presumption against preemption by explaining that an "assumption of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence" as is the case with the railroad industry. *Id.* at 178 (*citing Locke*, 529 U.S. 89).

The court rejected the argument that the BIA preemption applies only if federal regulations specifically cover the disputed issue. Whether or not to regulate is clearly within the discretion of the Secretary of Transportation

because the regulations apply to locomotive equipment. The Court noted that the BIA does not explicitly regulate asbestos and explained that "Congress intended for the BIA to occupy the field; thus, the Secretary of Transportation has the discretion to regulate those areas he or she so chooses." *Id.* at 178-79. The Court agreed with the arguments made by the Respondents herein that the FRA has addressed asbestos and determined that no regulations are required. Consequently, the use of asbestos on locomotives is clearly within the preempted field.

***West Virginia Asbestos Litigation*:** The West Virginia Supreme Court of Appeals also tackled the identical issues raised herein and, likewise, found that the BIA preempts "state tort law claims against manufacturers of parts or components of railroad locomotives. . . . " *West Virginia Asbestos Litigation*, 592 S.E.2d 818 (W.Va. 2003). The plaintiffs alleged that the railroad and manufacturers had caused them to be exposed to asbestos, which resulted in their alleged injuries. *Id.* at 820. The court noted the twelve trial and appellate decisions, which have all found state law claims against railroad manufacturers are preempted by the BIA. *Id.* at 823-824. The court stated that "an overwhelming body of case law persuades us that, through the passage of the Boiler Inspection Act, Congress has occupied the field of railroad safety so pervasively that plaintiffs' claims against the defendants are preempted." 592 S.E.2d at 822. The West Virginia court went on to state that any other conclusion was "blocked by an avalanche of adverse authority from other jurisdictions, both state and federal." *Id.*

Consequently, all of the state courts of last resort which have addressed the issues have agreed with the Ohio Supreme Court decision below.

***Law v. General Motors Corp.*:** On three occasions, the Ninth Circuit has held that state common law tort claims against locomotive equipment manufacturers are preempted by the BIA. *See Law*, 114 F.3d at 913; *accord Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempted state common law tort claims of a non-railroad employee injured by locomotive crane); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (common law negligence action against railroad manufacturers alleging inadequate warning devices on a locomotive are preempted by the BIA). In *Law*, railroad employees brought various state common law tort actions for hearing loss against the manufacturers of locomotive engines and brakes. *Law*, 114 F.3d at 909.

In affirming the district court's dismissal based on BIA preemption, the Ninth Circuit noted that "[i]t has long been settled that *Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.*" *Id.* at 910 (emphasis added). The court also recognized that the purpose of tort liability is an effort to persuade defendants to follow a standard of care that is established by the state common law, and the court rejected plaintiffs' argument that the field occupied by the BIA did not apply to state tort claims directed against manufacturers. *Id.* at 911.

The Ninth Circuit also rejected the plaintiffs' argument that injured railroad workers would be left without a remedy, finding Congress intended the FELA to be an exclusive remedy. *Id.* at 912. The court reasoned that placing the potential of liability for injuries to railroad workers solely upon the railroad employers would result in the railroads purchasing only from manufacturers whose products comply with the BIA. *Id.* The court concluded that, due to the fact that the railroads would demand BIA

compliant products, the manufacturers had a strong incentive to comply with the BIA and that the preemption of state common law tort claims did not compromise the safety of railroad workers. *Id.*

The Ninth Circuit relied on the language of the BIA and this Court's language in *Napier*, noting that the federal government has "established a comprehensive, national regime of locomotive regulation. This regime – enforced by FELA and the threat of heavy civil penalties – preempts every state effort to establish independent standards for the design, construction and material of locomotives." *Id.* Because this field is broad enough to encompass design defect claims against locomotive equipment manufacturers, the Ninth Circuit held the claims were preempted.

***Oglesby v. Delaware & Hudson Ry. Co.***: The Second Circuit likewise found BIA's preemption of state law claims. *See Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2nd Cir. 1999). In *Oglesby*, a railroad employee brought a FELA action against his employer and a state common law tort claim against a locomotive manufacturer, claiming he was injured adjusting a cab seat. *Id.* at 460. The district court denied the manufacturer's motion for summary judgment, finding no preemption. *Id.*

The Second Circuit disagreed. The court explained that the field occupied by the BIA includes manufacturers as well as railroads because the scope of the BIA extends to "both the 'design' and 'construction' of a locomotive's parts." *Id.* (citing *Napier*, 272 U.S. at 611). According to the court, the intent of Congress would be best accomplished by including manufacturers in the scope of the BIA because the design and construction of a locomotive parts are left in the hands of the manufacturer. *Id.* The Second Circuit rejected the plaintiff's argument that the BIA only

preempts legislation and regulations but not state common law tort causes of action because the preemption of state common law tort claims is necessary to maintain the "uniformity of the BIA." *Id.* The court noted that "an award of damages can act as a 'potent method of governing conduct and controlling policy.'" *Id.* (quoting *San Diego Bldg. Trades Council Millman's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959)). Because tort damages can force compliance with a state imposed standard, whether the source of damages comes from a statute or a common law remedy has no relevance. Both sources of regulation force railroad manufacturers to comply with a standard of care established by the state. *Id.*

***First Security Bank v. Union Pacific R.R.*:** The Eighth Circuit has held that state tort claims against railroad manufacturers are preempted. *See First Security Bank v. Union Pacific Railroad*, 152 F.3d 877 (8th Cir. 1998). In *First Security Bank*, the plaintiff was the administrator of the estate of a woman who was killed when her car was struck by a train at a railroad crossing. *Id.* at 878-879. The plaintiff claimed, in part, that the horn employed on the train that struck the plaintiff's decedent was inadequate to warn a person in a car of her make and model. *Id.* at 880. The district court dismissed the plaintiff's state common law tort claim on the basis of field preemption under the BIA. *Id.*

According to the Eighth Circuit, if each state were to adopt a different standard for triggering liability, the uniformity that was intended by Congress when it enacted the BIA would be subverted. *Id.* (quoting *Law*, 114 F.3d at 910-911). Because the plaintiff's state common law tort claim fell into a field of regulation that had been occupied by the federal government, the Eighth Circuit held that the plaintiff's claim was preempted. 152 F.3d at 880-81.

***Springston v. Consolidated Rail Corp.*:** The Sixth Circuit addressed the preemptive scope of the BIA and found that state common law tort law claims against railroad manufacturers are preempted. *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997). In *Springston*, the plaintiff brought claims against a railroad and train manufacturer after the vehicle in which he was traveling was struck by a train at a rail crossing. *Id.* at 243. The district court granted summary judgment in favor of the manufacturer, and partial summary judgment in favor of the railroad, ruling the plaintiff's claims that the railroad and manufacturer negligently failed to properly equip the train with visual warning devices were preempted. *Id.*

The Eighth Circuit stated that "[w]here Congress intends to occupy a field, state law in that field is preempted." *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212-13 (1983)). The Eighth Circuit noted that Congress intended to confer the scope of regulating all aspects of locomotive components to the federal government, thereby occupying this field and preempting state control. *Springston*, 130 F.3d at 245. This preemptive effect created by the occupation of this field is extensive and includes state common law tort claims. *Id.*

Because the decisions of the state courts of last resort and the United States Courts of Appeals are unanimous and wholly consistent with the decision of the Ohio Supreme Court below, the denial of the writ is appropriate.

## CONCLUSION

For all of the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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